

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Edison Mission Marketing & Trading, Inc.	)	Docket No. ER99-852-006
EME Homer City Generation, L.P.	)	Docket No. ER99-666-002
Harbor Cogeneration Company	)	Docket No. ER99-1248-002
Midwest Generation, L.L.C.	)	Docket No. ER99-3693-001
Sunrise Power Company	)	Docket No. ER01-2217-002
CL Power Sales One L.L.C.	)	Docket No. ER95-892-055
CL Power Sales Two L.L.C.	)	Docket No. ER95-892-055
CL Power Sales Five L.L.C.	)	Docket No. ER95-892-055
CL Power Sales Six L.L.C.	)	Docket No. ER96-2652-049
CL Power Sales Seven L.L.C.	)	Docket No. ER96-2652-049
CL Power Sales Eight L.L.C.	)	Docket No. ER96-2652-049
CL Power Sales Nine L.L.C.	)	Docket No. ER96-2652-049
CL Power Sales Ten L.L.C.	)	Docket No. ER96-2652-049
CL Power Sales Twelve L.L.C.	)	Docket No. ER99-893-007
CL Power Sales Thirteen L.L.C.	)	Docket No. ER99-892-008
CL Power Sales Fourteen L.L.C.	)	Docket No. ER99-891-008
CL Power Sales Fifteen L.L.C.	)	Docket No. ER99-890-008
CL Power Sales Seventeen L.L.C.	)	Docket No. ER99-4229-005
CL Power Sales Eighteen L.L.C.	)	Docket No. ER99-4230-004
CL Power Sales Nineteen L.L.C.	)	Docket No. ER99-4228-005
CL Power Sales Twenty L.L.C.	)	Docket No. ER99-4231-004
Citizen Power Sales	)	Docket No. ER94-1685-031

**COMMENTS OF THE
ILLINOIS COMMERCE COMMISSION**

Pursuant to Rule 211 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.211, the Illinois Commerce Commission ("ICC") hereby submits its comments in the above-captioned proceeding in response to a filing submitted by Edison Mission Marketing & Trading Inc. and its public utility affiliates ("Edison Mission").

I. BACKGROUND

On April 1, 2002 Edison Mission submitted for filing a consolidated triennial market power analysis update pursuant to the Commission's orders initially granting authorization to sell power at market-based rates. The cornerstone of the Edison Mission filing is the testimony of Mr. Philip Hanser. Edison Mission states that Mr. Hanser performs the Supply Margin Assessment ("SMA") screen as outlined in the Commission's Order in *AEP Power Marketing*.¹ Mr. Hanser states that with the exception of certain generation facilities in Illinois operated by Edison Mission affiliate Midwest Generation, all of the generation capacity owned, controlled or operated by Edison Mission is either, 1) under long-term contracts with terms extending beyond the three year market-based rate authority cycle; or 2) located within, or used to serve load within the control area of a Commission approved ISO or RTO.² As a result, the SMA screen is limited to the uncommitted Midwest Generation capacity located in Illinois, all of which is located within the control area of Commonwealth Edison ("ComEd").³

The results of the SMA screen performed by Mr. Hanser indicate that the supply margin in the ComEd control area exceeds the uncommitted supply from the generation facilities operated by Midwest Generation in Illinois. Therefore, Mr. Hanser concludes that Edison Mission is not pivotal within the region and, by the standard applied by the Commission, does not have the potential to exercise horizontal market power in the ComEd control area market.⁴ Accordingly, Mr. Hanser recommends that the Commission renew Edison Mission's authority to make sales at market-based rates.⁵

¹ Transmittal Letter, at 2

² Hanser Testimony, at 2

³ Hanser Testimony, at 2

⁴ Hanser Testimony, at 2

⁵ Hanser Testimony, at 15

On April 4, 2002 Edison Mission made a revised filing to correct clerical errors made in the worksheet for Exhibit PQH-4 of the Hanser testimony.

The Commission officially noticed Edison Mission's initial filing on April 8, 2002 and set an April 22, 2002 deadline for the submission of comments. In accordance with the procedural schedule in this case, the ICC provides the following Comments on both Edison Mission's initial and revised filings.

As a preliminary matter, the ICC notes that, as the entity charged with regulating public utilities in the State of Illinois, the ICC has a keen interest in the effect Edison Mission's filing will have on developing energy markets both at the wholesale level and at the ICC-jurisdictional level.⁶ As part of its regulatory duties, the ICC is required to ascertain that Illinois public utility rates, charges, and rules and regulations relating to rates and charges for retail service within Illinois are just, reasonable and non-discriminatory.⁷ The Illinois General Assembly has found that competition in the Illinois electric services market may create opportunities for new products and services at lower costs for users of electricity. While recognizing that developing competition must be accommodated, the Illinois General Assembly requires that competitive wholesale and retail markets must benefit all Illinois citizens.⁸ Accordingly, the Illinois General Assembly has also directed the ICC to "act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers."⁹

In order for the ICC to achieve its regulatory objectives, it is imperative that genuine competition exist in the wholesale market. The Illinois General Assembly recognized the relationship between the retail and wholesale markets and required the ICC to advocate the

⁶ 220 ILCS §5/1-101, *et seq.* (2000 & Supp. 2001).

⁷ *Id.*, at §§5/9-101 - 5/9-252.

⁸ 220 ILCS §§5/16-101A(b),(c).

⁹ *Id.*, at §5/16-101A(d).

development of competition in the wholesale, as well as the retail, market. This statutory directive is based on the Illinois General Assembly’s finding that “a competitive wholesale and retail market must benefit all Illinois citizens.”¹⁰

The restructuring that is occurring in the electric marketplace has placed an increased reliance on competitive wholesale markets to discipline prices. As a result, the effectiveness of the Commission’s efforts to measure the ability of sellers to exercise market power in wholesale markets, and to mitigate against the exercise of such power when it is present, has become increasingly critical to ensuring the establishment of just and reasonable rates for power and energy. Applicants that receive wholesale market-based rate authority from the Commission, and yet are still able to exercise market power, make it difficult or impossible for states such as Illinois to develop sustainable competitive retail markets.

II. ICC RECOMMENDATION

The ICC recommends that the Commission: 1) allow Edison Mission’s authority to make sales at market-based rates in the Commonwealth Edison control area to be renewed, conditioned on the requirement that Edison Mission file an updated market power analysis whenever the generation capacity under its control exceeds 5,000 MW and the transmission facilities of ComEd are not under the control of a Commission-approved RTO subject to Commission-approved market-monitoring and mitigation; 2) require Edison Mission to file the appropriate market power analysis a minimum of three months prior to the expiration of the contracts between Exelon GenCo and Midwest Generation; 3) require Edison Mission to notify both the Commission and the ICC if, and when, Exelon Generation Company (“Exelon GenCo”) releases

¹⁰ *Id.*

any contracted capacity; and 4) require Edison Mission to recalculate its SMA using the Simultaneous Import Capacity (“SIC”) figure of 3,000 MW, as discussed *infra*.

III. DISCUSSION OF ISSUES

A. The Standard SMA Test Applies to All Generating Capacity Either Owned or Controlled by an Applicant for Market Based Rates or its Affiliates—But Exceptions to the Standard Test May be Acceptable Under Particular Conditions

In *AEP Power Marketing*, the Commission outlined the Supply Margin Assessment, a market power screen for applicants requesting market-based rate authority.¹¹ In brief, the SMA test determines if the generation *owned or controlled by both the applicant and all of its affiliates* is necessary to meet peak load in a control area.¹² If the generation that is owned or controlled by the applicant or its affiliates is needed to supply load, then the applicant is determined to possess the ability to exercise market power.

The Commission explained how to apply the SMA test as follows:

In applying the SMA, we will first consider the control area market where the applicant is located. Next we will consider the markets outside the applicant's control area market. An applicant will pass the screen if it or its affiliates own or control through contract an amount of generation located in a control area which is less than the supply margin (generation in excess of load) in the control area. The margin will include the amount of generation that can be imported into the control area limited by the total transfer capability (TTC) of the transmission system (i.e., the lesser of uncommitted capacity or TTC). Sellers and their affiliates would continue to be allowed to sell into any control area where they pass the screen.¹³

¹¹ *AEP Power Marketing, et al.* 97 FERC ¶61,219 (November 20, 2001).

¹² The Commission exempted all sales going into an ISO/RTO with Commission approved market monitoring and mitigation measures from having to perform the SMA test. Commonwealth Edison is not a member of an ISO/RTO that satisfies this standard (indeed, currently, Commonwealth Edison is not a member of any RTO).

¹³ *AEP Power Marketing*, at 8.

In December of 1999, Edison Mission's affiliate, Midwest Generation acquired twelve generation facilities with a combined capacity of 9,479 MW from ComEd ("Illinois Plants").¹⁴ The Illinois Plants are wholly owned or leased on a long-term basis by Midwest Generation, with the majority of the output being purchased by ComEd's affiliate Exelon GenCo under long-term take-or-pay contracts.¹⁵

The SMA analysis submitted by Edison Mission focuses on the circumstance that sales from the Illinois plants are governed by three long-term agreements between Midwest Generation and Exelon GenCo.¹⁶ It is on the basis of these contracts that Edison Mission concludes that Exelon GenCo, not Midwest Generation, has "control" of the output of the Illinois plants and therefore, Edison Mission passes the Commission's SMA screen.¹⁷ However, Edison Mission's SMA analysis discounts the fact that the SMA applies to generation that Edison Mission owns in the ComEd control area, as well as the capacity that it controls.

Using the supply margin of 6,938 MW calculated by Mr. Hanser and a strict interpretation of the *AEP* Order, Midwest Generation fails the SMA screen by a wide margin, substantially due to its ownership of generating capacity in the ComEd control area.¹⁸ However, Edison Mission posits that it is Exelon GenCo, which has contracts for the output of the Illinois plants, and not Midwest Generation that controls the capacity.¹⁹ In particular, Edison Mission highlights that the contracts between Exelon GenCo and Midwest Generation are structured in such a way that Midwest Generation's open-market sales from undispached capacity are limited to periods when power prices are low. As a result, Edison Mission concludes that the potential

¹⁴ *Commonwealth Edison Company, Unicom Investment Inc. and Edison Mission Energy*, 89 FERC ¶62,105 (Nov. 08, 1999)

¹⁵ Hanser Testimony, at 4

¹⁶ Hanser Testimony, at 7

¹⁷ Hanser Testimony, at 11

¹⁸ Exhibit PQH-4

¹⁹ Hanser Testimony, at 7

for the exercise of market power by Midwest Generation is slight.²⁰ The ICC finds this reasoning persuasive given that Edison Mission is selling power to Exelon GenCo, a non-affiliate (assuming that there is no collusion taking place between either Edison Mission, Exelon GenCo or any of their affiliates).

Under the conditions specified herein, the ICC is not opposed to the renewal of Edison Mission's market-based rate authority for sales within and into the ComEd control area. However, the Edison Mission contracts also provide Exelon GenCo with options to terminate the agreements between Exelon GenCo and Midwest Generation. These termination provisions could significantly affect the amount of generation under the control of Edison Mission in the future. As a result, the reporting requirements and other commitments discussed below in Section B should be placed on Edison Mission to ensure that the ability of Edison Mission to exercise market power is mitigated.

B. Specified Conditions Under Which a Non-Standard SMA Test May be accepted in this Edison Mission Case

The agreements between Midwest Generation and Exelon GenCo provide Exelon GenCo the right to terminate the agreement with respect to any given unit in years 2002 through 2004²¹ Exelon GenCo also has the option to exercise one-year extension options on all the coal-fired facilities covered by contract.²² To date, Exelon GenCo has exercised all of its extension options for the coal generating stations and chosen to exercise early termination options totaling 300.7

²⁰ Hanser Testimony, at 8

²¹ Hanser Testimony, at 9

²² Hanser Testimony, at 9

MW among the peaking units.²³ Currently, Midwest Generation controls 493 MW of generation in the ComEd control area.²⁴

Exelon GenCo's ability to exercise extension and termination options on the output of the Illinois plants makes it difficult to estimate the amount of capacity controlled by Midwest Generation in future years. For example, if Exelon GenCo chose to exercise all of its termination rights and none of its extension options, the amount of capacity controlled by Midwest Generation for contract years 2003 and 2004 would be 7,783 MW.²⁵ Conversely, if Exelon GenCo exercised all of its extension options and none of its termination rights, the minimum amount of capacity controlled by Midwest Generation for contract years 2003 and 2004 would be 493 MW.²⁶

With Midwest Generation controlling 493 MW and a supply margin of roughly 6,938 MW in the ComEd control area, Mr. Hanser concludes that Edison Mission is not pivotal for the summer of 2002.²⁷ However, the capacity available to Midwest Generation during years 2003 and 2004 is highly dependent on the decisions of Exelon GenCo. Mr. Hanser acknowledges that the decisions of Exelon GenCo in contract years 2003 and 2004 will determine if Edison Mission is able to remain non-pivotal.²⁸ In an effort to address this concern, Edison Mission has indicated a willingness to file an updated market power analysis anytime the amount of generation under control of Midwest Generation exceeds 6,500 MW.²⁹

Edison Mission's proposal is a reasonable approach to ensure against the exercise of horizontal market power by Midwest Generation in the ComEd control area. However, the

²³ Hanser Testimony, at 9

²⁴ Exhibit PQH-3, Panel B

²⁵ Exhibit PQH-3, Panel B

²⁶ Exhibit PQH-3, Panel B

²⁷ Exhibit PQH-4

²⁸ Hanser Testimony, at 13

²⁹ Hanser Testimony, at 14

Illinois Plants account for nearly 38% of the total generation in the ComEd control area. In addition, up to 32% of the Illinois Plants' capacity could revert to Edison Mission as early as January of 2003. Furthermore, when the contracts between Exelon GenCo and Edison Mission expire on December 31, 2004, the entire 9,479 MW of capacity from the Illinois Plants will revert to Edison Mission. With the amount of generation controlled by Edison Mission being dependent on both Exelon GenCo's execution of its termination options during the life of the contracts and the expiration of the contracts in 2004, further precautions to ensure the mitigation of market power abuse are warranted.

First, a reporting requirement should be placed on Edison Mission to notify both the Commission and the ICC when any Edison Mission capacity currently controlled by Exelon GenCo reverts to the control of Edison Mission during the life of the contracts. Second, Edison Mission should be required to file the appropriate market power analysis a minimum of three months prior to the expiration of the contracts between Exelon GenCo and Midwest Generation. Third, the threshold for requiring Edison Mission to file an updated market power analysis should be lowered from 6,500 MW to 5,000 MW. The 6,500 MW threshold proposed by Edison Mission is derived by reducing the supply margin for the ComEd market by the amount of capacity in the ComEd market that is under the control of Edison Mission.³⁰ As the ICC will discuss in the following section, the 6,500 MW threshold proposed by Edison Mission is calculated using an outdated simultaneous import capability figure for the ComEd control area.³¹ Using a more current simultaneous import capability figure results in a threshold of 5,000 MW. This updated threshold and the reporting requirement should ensure that Edison Mission's ability to exercise market power in the ComEd control area is effectively mitigated.

³⁰ Exhibit PQH-4

³¹ Exhibit PQH-4

C. The Simultaneous Import Capability Figure Used by Edison Mission in its SMA Analysis is Outdated and should be Replaced by Current Information

In his SMA analysis, Mr. Hanser limits the total amount of import capability into the ComEd control area to that which is simultaneously feasible on a network system. Mr. Hanser states that the SMA order does not require the use of SIC as a refinement over Total Transfer Capability (“TTC”) measure, but that the use of the SIC makes the SMA results more conservative.³² The SIC figure of 4,500 MW used by Mr. Hanser is obtained from testimony provided by ComEd during the Commission’s merger approval proceedings involving PECO and ComEd.³³

The use of the SIC method to measure import capability into the ComEd control area is appropriate.³⁴ The SIC methodology evaluates the actual physical capability of the transmission system to import power into the ComEd control area at the time of the ComEd control area peak demand. Further, the SIC reflects the transmission constraints leading into ComEd’s control area and, thus, provides a more accurate assessment of the amount of power non-Edison Mission generators are able to transport into the ComEd control area for a particular time period (such as system peak). The use of any other figure results in an overly optimistic estimate of the ability of generators outside the ComEd control area to compete with Edison Mission controlled generation to serve load inside the ComEd control area.

More importantly, the use of an SIC measure to represent ComEd’s transmission import capability is consistent with the Commission’s stated intent in adopting the SMA screen. The Commission invited commentors to present arguments on a “case-by-case” basis that another

³² Hanser Testimony, at 12

³³ See Exhibit APP-400, Prepared Testimony of Steve Naumann, *Commonwealth Edison Company on Behalf of Itself and Its Public Utility Subsidiaries and PECO Energy Company On Behalf of Itself and Its Public Utility Subsidiaries*, 91 FERC ¶61,036, Docket No. EC00-26-000, (Apr. 12, 2000)

³⁴ See also the ICC’s comments in FERC Docket ER02-506 (2002)

factor limiting import capability is appropriate, if warranted by the facts.³⁵ Given the physical characteristics of an integrated network grid, the transmission constraints leading into the ComEd control area, and the need to evaluate the real impacts of these constraints at times of peak load, the use of simultaneous import capability in the SMA screen for the ComEd market is warranted.

On April 11, 2002, Mr. Bruce A. Renwick, Vice President of Transmission Operations and Planning for ComEd, appeared before the ICC's Electric Policy Committee and made an oral presentation concerning the ability of ComEd's transmission system to support the competitive generation market. In that presentation, Mr. Renwick stated that ComEd's summer SIC for 2002 is 3,000 MW. The 3,000 MW SIC figure provided by Mr. Renwick represents a more current SIC figure relative to the 4,500 MW SIC used by Mr. Hanser. Given these two alternatives, the 3,000 MW SIC is the proper figure to be used in the SMA analysis to represent the capability of the transmission system to import power into the ComEd control area at the time of the 2002 peak. The Commission should direct Edison Mission to refile its SMA using the more current SIC of 3,000 MW.

III. CONCLUSION

The Commission's SMA analysis considers generation that is both owned and controlled by an applicant and its affiliates. With a total capacity 9,479 MW either owned or leased by Midwest Generation and a supply margin of 5,438 MW for the ComEd control area, under a strict interpretation of the *AEP* Order, Midwest Generation fails the SMA screen by a wide margin. However, Edison Mission posits that almost all of the output of Edison Mission's Illinois plants is under the control of Exelon GenCo through long-term contracts. Furthermore,

³⁵ See Footnote 12, *AEP Power Marketing*, at 7.

Edison Mission states that the contracts are structured in such a way that Midwest Generation's open-market sales from undispached capacity are limited to periods when power prices are low. Given these representations, the potential for the exercise of market power by Midwest Generation appears to be mitigated. Moreover, Edison Mission has stated a willingness to refile an SMA if the amount of capacity under the control of Midwest Generation approaches the level of the supply margin.

While Edison Mission's re-filing commitment is appropriate, the ICC believes that the amount of capacity owned by Midwest Generation in the ComEd control area and the uncertainty regarding the amount of capacity Edison Mission will control in the future, warrant further precautions to ensure the mitigation of market power potential. Accordingly, the Commission should require Edison Mission to notify both the Commission and the ICC if, and when, Exelon GenCo terminates any of its agreements with Midwest Generation, file the appropriate market power analysis three months prior to the expiration of the agreements in December, 2004 and to refile its SMA if the amount of capacity under Edison Mission's control approaches the updated 5,000 MW supply margin in the ComEd control area.

If the Commission adopts these conditions, the ICC does not oppose the reauthorization of Edison Mission's market-based rate authority for sales within and into the ComEd control area.

Dated: April 23, 2002

Respectfully submitted,

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